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The last say?

Comment on CJEUs judgement in the Tapiola case (C-674/17)

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Abstract

This article is comment to the judgement from October this year by the European Court of Justice's in the *Tapiola case* (C-674/17). This comment can be seen as a follow-up to what I wrote about the Advocate General Henrik Øe's opinion in the case, which was published in last issue of this journal (Darpö, J: *Anything goes*. JEEPL 2019:3 at pages 305-318). The case concerns a request for a preliminary ruling from the Finnish Supreme Administrative Court about the possibilities open under Article 16(1)(e) of the Habitats Directive (92/43) to perform license hunts on a strictly protected species listed under Annex IV to that Directive, namely the wolf (*Canis lupus*). The comment first describes the main points in the the findings of the CJEU. Thereafter, a discussion follows focusing on three issues. The first concerns the relationship between Article 16(1)(e) of the Habitats Directive and the other derogation grounds in that provision from the strict protection of species. Next issue deals with the relationship between Annex IV and Annex V species, an issue linked to the assessment of the conservation status. The final question relates to how this conservation status is decided concerning species which roams over vast territories, not bothering about administrative restrictions such as national boarders or international obligations. At the end, the author makes some concluding remarks about the wider implications of the judgement for the species protection under the Habitats Directive and the Birds Directive (2009/147).

Key words: Habitats Directive, Species protection, Derogation, Wolf issue, License hunting, Favourable conservation status, Natural Range

Introduction

On 10 October, the CJEU's judgement on the *Tapiola case* (C-674/17) came at last. Here, the Court delivered its say on whether "license hunts" or "management hunts" on large carnivores are allowed under the Habitats Directive (92/43). The judgement was welcomed as a victory by both sides in this fierce controversy. The hunters' associations stressed that the judgment leaves the door open for hunting as a management tool of large carnivore populations, whereas the ENGO community emphasized the strict requirements for such hunts which were set up by the CJEU.[1] For my own part – having studied the issue for almost a decade now[2] – I would describe the judgement as a compromise having pros and cons from an environmental law perspective. In sum, the CJEU accepts that management hunts can be performed according to Article 16(1)(e) on strictly protected species listed in Annex IV to the Directive, even if the population has not reached Favourable Conservation Status (FCS). However, 16(1)(e) cannot be used as a "catch-all" provision for all situations where the other derogation grounds may not be fully applicable. Thus, the objectives to be achieved under this provision must be some other than those under Article 16(1)(a) to (d), and additional criteria are set up which shall be applied strictly. The burden of proof for the applicability of those criteria lies upon the deciding authority, which have to show sound scientific evidence on the effects of the derogation and whether the hunt is effective in obtaining the objectives. Finally, the administration must also show that there are no alternative means in achieving these goals. Much of this was already predicted by Advocate General Henrik Øe in his opinion from May this year. But in some respects, the CJEU goes further in setting up restrictions for the use of Article 16(1)(e).

The judgement on C-674/17 is the answer to a request for a preliminary ruling from the Finnish Supreme Administrative Court. For those who are unfamiliar with the case, the details are described in my comment to the Advocate General's opinion in the latest issue of this journal ("Anything goes" in JEEPL 2019:3 at pages 305-318). This is why the description here can be kept short: The case in the national court concerns two licenses for the hunt of 3 and 4 animals in identified packs in the Finnish region Norra Savolax which were issued by the Wildlife Agency in 2015/16. Those 7 animals were part of a total hunting bag of 44 in a population of 275-310 wolves. The derogations were based on Article 16(1)(e) with the purpose of making the inhabitants in those areas more tolerant of the presence of the wolves with the aim of bringing down poaching, which in turn

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[1] See the European Federation for Hunting and Conservation's (FACE) comment to the case; "*Green light for hunting as a management tool for wolf*", posted on 22 October (https://www.face.eu/2019/10/green-light-for-hunting-as-a-management-tool-for-wolf/), which mirrors the reaction from the Swedish Hunters' Association and its journal Svensk Jakt, posted on 10 October (https://svenskjakt.se/start/nyhet/eu-ger-klartecken-for-vargjakt/). From the ENGO community, one can read ClientEarth's lawyers Anna Heslop's and Soledad Galego's article in European Law Blog, posted on 22 October "*Court Highlights strict rules in milestone ruling for wildlife protection C-674/17*" (https://europeanlawblog.eu/2019/10/22/court-highlights-strict-rules-in-milestone-ruling-for-wildlife-protection-c-674-17/) and the comment by the Swedish Society for Nature Conservation on 21 October; "*EU-domstolen sätter ned foten om vargjakten*" (https://www.naturskyddsforeningen.se/nyheter/eu-domstolen-satter-ner-foten-om-vargjakten).

[2] The first report I wrote on the matter was *Brussels Advocates Swedish Grey Wolves. On the encounter between species protection according to Union law and the Swedish wolf policy.* SIEPS Policy Analysis 2011:8.

would improve the conservation status of the species. Other stated objectives for the hunt was to prevent harm to hunting dogs and to increase the general feeling of safety among the public. Legal action was brought against the decisions by the ENGO *Tapiola*, claiming that the decisions infringed Articles 12 and 16 of the Habitats Directive. The case went all the way to the Supreme Administrative Court, which wanted the CJEU to give its say on whether hunting for "management purposes" on a population that does not have FCS can be accepted under Article 16(1)(e) of the Habitats Directive. If the answer is affirmative, the referring court asked about if such derogations are granted for a specific area, should the conservation status of the species be assessed by reference to that area or to the territory of the Member State as a whole. The Finnish court also wishes to know to what extent such derogations may be justified by a reduction in poaching and, in that regard, how significant it is that the hunt forms part of a national management plan. Concerning alternatives to the hunt as a means for combating poaching, the court wants to know whether the difficulties associated with monitoring such illegal activities can be taken into regard. A final question concerns whether the desire to prevent harm to dogs and to increase the general feeling of safety of people falls within the scope of derogation under Article 16(1)(e).

In this comment, I will first describe the findings of the CJEU in the case, and, second, give some viewpoints on the most controversial issues concerning the hunt of large carnivore. At the end, I will draw some conclusions about the wider implications of the judgement on species protection under EU nature conservation law.

The CJEU's judgement in the Tapiola case (C-674/17)

Some starting-points for the strict protection of species (24-31)

To begin with, the CJEU makes a couple of statements which today can be regarded as "basics" on the strict protection under Article 12 of the Habitats Directive and the room for derogation under Article 16.1. Thus, the Court states that the aim of the Directive is to ensure biodiversity in the Member States of the EU by maintaining or restoring natural habitats and species at FCS, taking into account economic, social and cultural interests, including local characteristics (Articles 2(2) and 2(3)). To meet the requirements of Article 12, the Member States shall undertake concrete and specific protection measures in order to avoid capture or killing of animal species listed in Annex IV. Even though Article 16(1) allows for exemptions from the strict protection, Member States must ensure that there is no satisfactory alternative to these measures and – if not – that the derogation is not detrimental to the maintenance of the species in question at a FCS in its natural range. Further, as the derogations under Article 16 are exceptions to a system with strict protection, the criteria in the provision shall be interpreted strictly and it rests upon the decision-maker to show that they are met in each case.

Article 16(1)(e) and the relation to the other derogation grounds (32-38)

After this, the CJEU furthers on to the specifics of Article 16(1)(e). First, the Court notes – referring to the Advocate General (para 40 in his opinion) – that the expression "taking" must be understood as including both the capture and killing of the strictly protected species, thus including hunting, but only in case all other requirements of that Article are met. As I argued in the comment to the Advocate General's opinion, this was expected.

When comparing Article 16(1)(e) with the other derogation grounds, the CJEU then makes an important clarification as regards the relationship between the provisions: The (e) point "cannot serve as a general legal basis for granting derogations" from the strict protection (36). If that was the case would namely the other derogations grounds in Article 16(1) be superfluous, which in turn would deprive the system of its effectiveness. Consequently, the objective to be obtained by the use of Article 16(1)(e) cannot be confused with those under Article (a) to (d), why this provision "can only serve as a basis for the grant of a derogation in cases where the latter provisions are not relevant" (37). Thus, Article 16(1)(e) is still kept as a "last resort" provision, only applicable when the other derogation grounds are not relevant. In addition to this, the CJEU notes derogations under Article 16(1) as a whole must not produce effects that are contrary to the objective of ensuring biodiversity according to Article 2(1) of the Directive.

The objective to be attained and alternatives to derogation (39-53)

According to the Finnish Wildlife Agency, the aim of the license hunt was to reduce poaching, prevent harm to hunting dogs and increase the general feeling of safety among the inhabitants living in areas occupied by wolves. Thereby, the social acceptance for wolves would increase, resulting in less poaching. To this, the CJEU comments that objectives under Article 16(1) must be defined in a precise manner and supported by evidence. The Court notes that poaching of wolves in Finland has been widespread and poses an important challenge to the conservation of the species. To this background, combating poaching can be regarded as an objective as such under Article 16(1)(e). But it needs also to be established that management hunt is an effective means to obtain the aimed goal, and in this respect the CJEU is more hesitant. It first observes that at the time of deciding there were uncertainties to the effect on poaching. Therefore, it is for the deciding authority to establish – on the basis of rigorous scientific data – the accuracy in the proposition that hunts can have such an effect, and that that effect is positive for the population status as a whole, taking into account other causes of mortality. As this proposition is contested, it is for the national court to decide whether the Agency has produced sufficient supporting evidence in this respect. Here, the CJEU also notes that the national court in its referral informed that there was no scientific evidence that such a measure would have an overall positive effect on the conservation status of the species.

In addition, the deciding authority also needs to establish that there are no alternative solutions to hunting as a means to reach the aimed goal. According to CJEU, the mere existence of poaching or difficulties in the monitoring of such illegal activities cannot be sufficient to exempt the Member States from the obligations under Article 12 of the Directive. On the contrary, in those situations priority should be given to stricter and more effective monitoring and the implementation of other measures to uphold the law. Instead of just pointing at the difficulties in combating poaching, it is for the deciding authority to provide clear and sufficient reasons as to the absence of satisfactory alternatives to management hunts to minimize these activities. In this case, notes the CJEU, there is nothing in the order for reference that indicates that the Finnish Wildlife Agency met with those requirements. The Court therefore finds that it appears that the decisions do not provide with clear and sufficient reasons in this respect, which however is left for the referring court to confirm.

At what level shall FCS be assessed? (54-69)

Another question from the Finnish Supreme Administrative Court concerns the impact of management hunts on the conservation status of the wolf population and at what level this status shall be assessed. The point of departure for this discussion is given in the beginning of Article 16(1) as a general prerequisite for all exemptions, namely that the derogation is not detrimental to the maintenance of FCS of the species in question. Another starting-point for the reasoning of CJEU is that derogations must not endanger the long-term preservation of the dynamics and social stability of the species. Therefore, the competent authority must first decide on the population's conservation status at a national level or, when relevant, at a biogeographic-regional level. If the species' natural range stretches over several Member States, this assessment must even be performed at a cross-border level. However, one cannot take into account parts of the population that resides within bordering countries which are not bound by an obligation of strict protection of species of interest for the EU. Second, the authority must assess the geographic and demographic effect of the derogation on the population at those levels. In order to do so, it is necessary to assess the local impact that the derogation will have in order to evaluate the cumulative impacts from different derogations and other causes of mortality. A management plan for the conservation of the species may be an adequate tool for the fulfilling of this task.

From the figures presented by Tapiola and the Commission in the case, the CJEU estimates that during the hunting season 2015-16 the number of killed wolves was 43 or 44 out of a population of between 275 and 310 specimens. Thus, almost 15% of the population was killed in management hunts, out of which half were breeding specimens. That seems to be 13 or 14 more than those killed by poaching, which resulted in a net negative effect on the population.[3] In the light of these data, the CJEU finds it doubtful that the management plan and the national quota system made it possible to ensure that the hunt would not be detrimental to the wolf's conservation status, although this is for the national court to ascertain. While stating this, the CJEU also stresses that derogations from the strict protection can be allowed even if the species in question has not reached FCS. Referring to C-342/05 *The Finnish wolf case* (2007), the Court reiterates that such derogations can be granted by way of exception if it is duly established that the measure will not worsen the population's conservation status or prevent its restoration to FCS. In other words, the derogation must be at least neutral to the conservation status of the species in question. However, this assessment should be performed in the light of the precautionary principle, meaning that any doubt about the effects on the conservation status shall be to the benefit of the wolves.

The specific criteria under Article 16(1)(e) (70-79)

Article 16(1)(e) states that the taking of strictly protected species can only comprise a limited number of certain specimens on a selective basis, and the measure must be per-

[3] In my view, it is not crystal clear what the CJEU means when it states that the license hunt "is actually capable of reducing illegal hunting to such an extent that it would have a net positive effect on the conservation status of the wolf population" (para 45). However, from comparing this paragraph with paragraphs 46 and 63-64 it is reasonable to believe such an effect occur when the number killed in license hunt is smaller than the number by which the poaching is reduced, that is that the population size after the license hunt is bigger compared with the size without any such hunt.

formed under strictly supervised conditions. According to the CJEU, the limited and specified number in each case depends upon the population level, the conservation status of the species and its biological characteristics. This must be evaluated from the most rigorous scientific data concerning geographic, climatic, environmental and biological factors, taking into account reproduction and mortality. In order to satisfy those conditions, the number of species taken in this context must not entail a risk of significant negative impact on the structure of the populations, even if it is not in itself detrimental to the population status. The number needs also to be specified in the derogation decision. Concerning the limited and selective basis on which certain specimens are taken, the Court stresses that the derogation only covers the narrowest and most efficient number of animals needed to obtain the pursued goal, sometimes even down to a specified group of animals or even individuals. The requirement for strictly supervised conditions for the hunt means that they must be able to guarantee that the numbers to be killed are kept, as well as ensuring that the control is effective and timely.

In the referred case, the CJEU expresses doubts as to whether a regional hunting quota of 7 animals – amounting to a total bag of 43 on a national level – meets the requirements under Article 16(1)(e). Some guidance was given in the derogation decisions, but they were only recommendations. In contrast with those, half the number of wolves killed in the hunt were alpha males, that is breeding specimens which are regarded as especially important for the conservation status of the species. To this backdrop concludes the CJEU, it is not apparent that the conditions of the hunt are such to ensure that the criteria in Article 16(1)(e) are met, a check which however is for the referring court to carry out.

Comment to the CJEU's findings

Introduction

As noted, the *Tapiola case* deals with the use of Article 16(1)(e) as a legal ground for derogation of the strict protection of the wolf as a means to combat poaching, prevent hunting dogs to be killed and to improve the feeling of insecurity among those who live in areas where wolves reside. The situation in question is thus particular to the case and it seems obvious from the information provided in the reference and the wordings of the CJEU that the Finnish Supreme Administrative Court will quash the hunting decision when it delivers its judgement in the beginning of 2020. But even so, some of the findings of the CJEU are of a more general nature and will be relied upon in a variety of situations where species protection under EU law is relevant. While it is true that one should take caution from drawing farfetched conclusions from a single judgement, legal scholars remain free to do so. However, the reader is advised to take my conclusions as mere points of discussion.

In my comment to Advocate General Henrik Øe's opinion in the case, I highlighted a couple of pivotal questions on species protection under the Habitats Directive that needs to be decided by the CJEU. The first concerns how we regard Article 16(1)(e) – is this a "last resort provision" or a derogation ground which can be used in all situations where Articles 16(1)(a) to (d) do not apply, a kind of "catch-all provision"? Next issue deals with the relationship between Annex IV and Annex V species under the Habitats Directive, an issue linked to the importance of FCS for the species in question. A final question relates to how FCS is assessed concerning species which roams over vast territories,

not bothering about administrative restrictions such as national boarders or international obligations. My comment is focused on these three issues.

Strict and additional criteria for use of Article 16(1)(e)

In the beginning, I said that the judgement can be regarded as a compromise between the two sides in the wolf controversy. From one perspective, the judgement is as strict as the opinion of the Advocate General, and in certain parts, it goes even further in that direction. The most important issue where the CJEU takes a stricter position concerns the relationship between the (e) point and the other derogation grounds in Article 16(1). Here, the Advocate General suggested that (e) can be used whenever the others are not fully applicable, for example when the criterion for serious damage under (b) is not met and protective hunt therefore is not allowed. In contrast, the CJEU states that (e) cannot be used in that general way and that the objective to be obtained by the use of this last derogation ground must be some other than those covered by (a) to (d). From the reasoning in the judgement (paras 42-43), it is clear that combating poaching is regarded as an objective under (e) under the circumstances at hand. These were namely that poaching was an important challenge to the wolf's conservation status in Finland and that a measure aiming to reduce these illegal activities would contribute to the maintenance or restoration of that status. However, also in contrast with the Advocate General, the CJEU does not mention the protection of hunting dogs and the improvement of the general feeling of security as acceptable objectives under the Habitats Directive.[4] The question then remains as to which objectives other than combating poaching are acceptable under Article 16(1)(e). Little guidance is given in the judgement, but in the light of the foregoing, we may assume that the overarching aim of any license hunt must be to maintain or restore the conservation status of the species in question. In this respect, will there be a difference between those objectives that may be accepted for species having FCS and those which do not? In the Swedish context, license hunts of large carnivore – wolverine, lynx, brown bear and wolf – today can be performed with the objective to "reduce high concentrations of the species in sensitive areas". For example, "social acceptance" of the wolf population is said to be improved by license hunts in such areas aiming at the protection of sheep farming and traditional hunting in the countryside, where elk is a common good for hunters and wolves alike. Will this objective be acceptable under Article 16(1)(e)? However, as with poaching, some of these goals will have challenges in passing the next hurdle under Article 16(1), namely that the license hunt is an effective means as such to reach the goal, and in addition, that there are no better alternatives. In that respect, the CJEU is strict in its judgement, stating that the competent authority must be able to show – on the basis of rigorous scientific data – that the hunt will have the desired effect (45), as well as there are no alternative means available to obtain that positive effect for the population (51). In my view, the application of the precautionary principle here is also noteworthy, strongly requiring the national courts to control the scientific data supporting the propositions for such hunts.

According to the first sentence of Article 16(1), derogations are possible if they are not "detrimental to the maintenance of the populations of the species concerned at a favoura-

[4] Those two objectives are not elaborated upon after paragraphs 39-40 in the judgement, where they are just mentioned as objectives in the Finnish wolf management plan.

ble conservation status". In the *Finnish wolf case*, the CJEU made clear that this means that derogations are also possible when the species in question has not reached FCS, so long as the measure is "neutral" to the population's status.[5] This position is reaffirmed in the *Tapiola* judgement. However, both the Advocate General and the CJEU clarifies that Article 16(1)(e) contains additional requirements in that the derogation must only comprise a "limited number" of specimens. This additional requirement is described by the CJEU so as that "number does not entail the *risk of significant negative impact on the structure of the population* in question, even if it is not, in itself, detrimental to the maintenance of the populations of species concerned at a favourable conservation status in their natural range" (72). This additional criterion is applied quite strict by the CJEU, which expresses doubts on whether 43 or 44 animals, almost 15% of a population, can be regarded as a "limited number (75).[6] In my view, this clarification about the numeric criterion under Article 16(1)(e) is welcome, although the question remains; what does "significant negative impact on the structure of the population" actually mean? In this respect, little guidance can be found in the Advocate General's opinion and the judgement, why we have to await further case-law on the matter. Such cases under either the Birds Directive or the Habitats Directive will surely come, as the *Tapiola* judgement in certain respects opens up for more license hunts of protected species, which I will discuss under next heading.

Management hunts on species not having FCS

Over the years I have argued that the Habitats Directive is built upon the distinction between species listed in Annex IV enjoying strict protection and those under Annex V, which are allowed to hunt for management purposes (see Article 14(2) of the Directive). I have also suggested that the assessment of the conservation status should be decisive for the listing between the two annexes. Species obtaining FCS should be moved from Annex IV to V, and the other way around. This was probably also the original intention with the listing system, even though such relisting never has been performed in spite of strong scientific reasons therefore. In the comment to the Advocate General's opinion, I mentioned as an example the brown bear in Scandinavia, a species which has rocketed in numbers way beyond the limit of having FCS, but still listed in Annex IV. To this background, I have found that a reasonable attitude would be to allow hunts for management purposes of species having FCS, irrespective of listing.

After the judgement in the *Tapiola case*, this systematic argument has reached an end, as the CJEU leaves open *management hunts on species not having FCS*. One may of course point to paragraph 55, where the Court says that FCS is a "necessary prerequisite" for the granting of derogations under Article 16(1), and also the wording in paragraph 75 mentioned above. But from paragraph 68, it becomes clear that the CJEU reaffirms the position from the *Finnish wolf case*, namely that derogations can be granted also for species not having FCS as long as the measures will not have negative effects on the status of the population. Even though the requirements that the Court establishes for such hunts

[5] C-342/05 *The Finnish wolf case* (2007) para 29.

[6] My Finnish is non-existing, but with help of colleagues, I have reason to believe that there is a misinterpretation in the English translation of para 64. The original version presents the numbers in that paragraph as a statement of the CJEU, not merely as facts presented by Tapiola and the Commission. The French and the Swedish translation are in line with the original judgement in Finnish.

are strict and decisions must be taken in accordance with the precautionary principle, this can be regarded as the most unfortunate outcome of the judgement. One may also ask in what situations there is a need for such hunts under Article 16(1)(e). Clearly, there are good reasons to perform protective hunts under (b) when there is a risk of serious damage, even if the animal in question is a part of a population not having FCS. The same can be said of most of the other derogation grounds in Article 16(1) as they are so to say independent of the conservation status of the species in question. But the taking and keeping of "certain specimens of species (…) in limited numbers" in order to obtain other objectives which still can be regarded "as a means of contributing to the maintenance or restoration of the species concerned at a FCS"? As this opening up of Article 16(1)(e) surely will be used by national authorities under the pressure from opinions of farmers and hunters, we can look forward to more cases concerning the boundaries for these hunts. As for the logical reasons for this blurring of the system of strict protection, I cannot see them. Be that as it may, but since the CJEU now has decided in the matter, I rest my case.

The natural range of strictly protected species

Another controversial issue concerning the strict protection of large carnivore relates to the definition of "natural range", one of the main components for the assessment of FCS of a species. In *Tapiola*, the CJEU makes clear that concerning species roaming over vast areas across administrative boarders, this assessment must be performed at both local and national level, and if necessary, at the level of the biogeographic region. The assessment cannot, however, take into account parts of the population residing within countries which are not bound by strict protection schemes for species (60). For the Nordic Member States to the EU, this means that they may include the wolf population in Norway – bound by the Bern Convention[7] – but not the one in Russia. This is problematic as both Sweden and Finland are relying on the contribution from the East in their assessment of the conservation status of the population. In Finland, this is clearly stated in the draft for a new management plan for wolves in 2019.[8] Also the Swedish Environmental Protection Agency's assessment from 2015 about the wolf's conservation status was based on the assumption that the population in our country is part of the much bigger Finnish-Karelian-Murmansk population.[9] This larger group numbers to at least 500 genetically effective specimens (equals to approx. 1 700 animals), which fulfils the requirement of being a "long-term viable population" according to the Habitats Directive. Against this background, it is argued, it suffices to have 300 wolves in Sweden, including those which

[7] One may of course argue that Norway is less accountable as this country applies the derogation possibilities under the Bern Convention in a way that clearly differs from the EU's understanding of the similar provisions in the nature conservation directives (see Trouwborst,A/Fleurke, FM/Linnell, JDC: *Norway's Wolf Policy and the Bern Convention on European Wildlife: Avoiding the "Manifestly Absurd"*. Journal of International Wildlife Law and Policy, 2017 pp. 155-167). But even so, Bern surely qualifies as a legal regime containing "obligations of strict protection of species of interest for the European Union".

[8] Utkast till Förvaltningsplan för vargstammen i Finland. Jord- och skogsbruksministeriet 21/6-19, sid. 7; https://mmm.fi/documents/1410837/14389421/Luonnos+Suomen+susikannan+hoitosuunnitelmaksi+27.6.2019_sv.pdf/349edef2-f283-9586-420f-937f54530088/Luonnos+Suomen+susikannan+hoitosuunnitelmaksi+27.6.2019_sv.pdf.pdf

[9] http://www.naturvardsverket.se/upload/miljoarbete-i-samhallet/miljoarbete-i-sverige/regeringsuppdrag/2015/ru-bevarandestatus-varg/Regeringsuppdrag-delredovisning-utreda-gynnsam-bevarandestatus-for-varg-korrigerad%20version.pdf

reside in the border area between Sweden and Norway, if only there is a certain genetic flow from the larger population.[10] Not very surprising, after the *Tapiola* judgement there are arguments made claiming that the long-term viable population of at least 1 700 animals must now be upheld in the Finnish-Swedish-Norwegian region, irrespective of what happens in the Russians oblasts. Of obvious reasons, I will not enter into this ecological-genetic discussion, but I think it is reasonable to conclude that both the Finnish and the Swedish position need to be revaluated in the light of the *Tapiola* judgement concerning the definition of "natural range" for the wolf population.

Concluding remarks

For Finland, the judgement will obviously have a direct importance for the case in which the reference was made. The Finnish government also admitted in a press release on 10 October, that the ruling will have wider implications on the wolf policy, as it was "stricter than expected".[11] However, this does not seem to have practical consequences, as hunting of wolves today in that country is not based on Article 16(1)(e), but performed as protective hunts and hunts for reasons of public safety (Article 16(1)(b) and 16(1)(c) respectively). Also for Sweden, the *Tapiola* judgement will have effects on the management of large carnivore. Over the years, license hunts have been undertaken according to Article 16(1)(e) on wolves, lynx and brown bear. In November 2019, the SEPA issued its first decision on license hunt on wolverines in a reindeer herding area.[12] However, management hunts on wolves have been stayed recent years, since the population dropped quite drastically after 2016 and 2017. The basic prerequisite for these hunts in Sweden is namely that the species in question has obtained FCS, which today is questionable as regards the wolf (about 300 animals). Even so, the Swedish attitude could rightly be criticized for being too lax on the criteria for derogation from the strict protection of the wolf population. In my view, this critique was mostly valid for the decision to kill 24 animals in 2017 despite the reduction of the population with 20% in just one year, getting close to the level of FCS. Also the stern attitude from the Swedish Supreme Administrative Court at that time *not* to make a request for a preliminary ruling from the CJEU on how to understand Article 16(1)(e) was remarkable. Clearly, the Finnish Supreme Court made another interpretation of its obligation under Article 267 TFEU one year later. The Swedish application of the derogation grounds could also be criticised on other points in the light

[10] See for example in Liberg, O/Chapron, G/Wikenros, C/Flagstad, Ø/Wabakken, P/Sand, H: *An updated synthesis on appropriate science-based criteria for "favourable reference population" of the Scandinavian wolf (Canis lupus) population.* Assignment from the Swedish Environmental Protection Agency (SEPA), 10 September 2015. In this report, it is stated (page 51): "We interpret this to mean that non-EU populations can be considered as long as this is clearly stated in the Article 17 report".

[11] Europeiska unionens domstols avgörande om jakt på varg i stamvårdande syfte striktare än väntat. Jord- och skogsbruksministeriet 10/10-19; https://mmm.fi/sv/artikel/-/asset_publisher/euroopan-unionin-tuomioistuimen-ennakkoratkaisu-suden-kannanhoidollisesta-metsastyksesta-odotettua-tiukempi

[12] Naturvårdsverket decision 2019-11-15 in case NV-04662-19; http://naturvardsverket.se/upload/nyheter-och-press/press2019/beslut-om-licensjakt-efter-jarv-i-i%20jamtlands-lan-2019.pdf. The protection of the wolverine is particularly interesting, as this species is not covered by Annex IV to the Habitats Directive, but included in Annex II to the Bern Convention. As that Convention is signed by both the EU and its Member States and thereby is a "mixed agreement", the wolverine shall enjoy similar protection according to Articles 6 and 9 of Bern as those species listed in Annex IV to the Habitats Directive.

of the findings in *Tapiola*, but the long-term consequences of that judgement will perhaps be "in the other direction" so to speak, on which I have a final remark.

This remark concerns the wider implication of the judgement, not only for the derogation possibilities from the strict protection according to the Habitats Directive, but also for the Birds Directive. A similar exemption from the protection can be found in Article 9(1)(c), which permits "under strictly supervised conditions and on a selective basis, the capture, keeping or other judicious use of certain birds in small numbers". Case-law under Article 9(1) of the Birds Directive is regarded as valid for derogations possibilities under the Habitats Directive, and vice versa. And, as I argued in the comment to the Advocate General's opinion in the *Tapiola* case, a widening of the derogation possibilities under the nature conservation directives has implications for all kinds of situations where human development is on its way, such as building projects, infrastructure, industrial installations, energy projects, waterworks, use of chemicals, etc. Whilst it is true that the CJEU closed some of the doors left open by the Advocate General, the possibility to perform license hunts on species not having FCS is worrying. On the one hand, we may expect that the deciding authorities will show "rigorous scientific data" supporting that such a hunt will not "entail the risk of significant negative impact on the structure of the population in question, even if it is not, in itself, detrimental to the maintenance of the populations of species concerned at a favourable conservation status in their natural range". On the other, the imagination among certain authorities to interpret what this means cannot be underestimated. Let us only hope that the national courts – with or without scientific expertize – are able and willing to perform a strict scrutiny on such practises. This way, the answer to the question in the title to this comment will be negative, as we can look forward to more requests for preliminary rulings from the CJEU and subsequent case-law on the matter.